SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 154

JESSE GAY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals, which has not yet been reported, appears in the appendix hereto.

JURISDICTION

I.

The judgment of the Court of Appeals, appearing in the appendix hereto, was entered March 27, 1969.

II.

Petition for rehearing en banc was denied April 15, 1969 and an order denying petition for rehearing by the panel was entered April 28, 1969.

III.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED FOR REVIEW

Where government charges unlawful transportation of stolen meat from Mason City, Iowa to Dallas, Texas, alleging the meat was stolen because acquired by fraud at Mason City, and proves, instead of fraudulent acquisition at Mason Ctiy, a later theft of the meat at Sioux City, Iowa, after lawful acquisition at Mason City, is the variance between the theory alleged and the theory proved mere harmless error?

STATUTES AND RULES INVOLVED

This case involves Fed. Rules Cr. Proc. Rule 7 (c), 18 U.S.C., which provides in pertinent part:

> "The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *"

Rule 52 (a) which provides:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

18 U.S.C. § 2314, 82 Stat. 885, provides in pertinent part:

> "Whoever transports in interstate * * * commerce any goods, * * * knowing the same to have been stolen, converted or taken by fraud; * * *
>
> * * *
>
> "Shall be fined not more than $10,000.00 or imprisonment more than ten years, or both."

18 U.S.C. § 659, 80 Stat. 904 provides in pertinent part:

"Whoever * * * by fraud or deception obtains from any * * * platform or depot * * * with intent to convert to his own use any goods * * * which are a part of * * * an interstate * * * shipment of freight; * * *

* * *

"Shall in each case be fined not more than $5,000.00 or imprisoned not more than ten years or both * * *."

18 U.S.C. § 2111, 63 Stat. 105, provides:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

STATEMENT OF THE CASE

Jesse Gay, an independent trucker (R. 67), failed to deliver a load of meat, purchased for Gay's account (R. 50) by a Los Angeles meat broker from Decker, an Iowa packer, which meat Gay had contracted to re-sell to the broker in California at a profit to Gay of $700.00 (R. 48).

As a result of Gay's failure to deliver, a two-count indictment was filed in the United States District Court for the Northern District of Iowa alleging that: (1) on January 19, 1965, and continuing till January 27, 1965, he transported from Mason City, Iowa, to Houston and Dallas, Texas, 40,000 pounds of spare-ribs of the value of $9,400.00, knowing the meat to have been stolen in violation of 18 U.S.C. § 2314, and (2) that on January 19, 1965, he obtained the meat by fraud and deception from Decker's platform in Mason City, Iowa, which meat was part of an interstate shipment of freight in violation of 18 U.S.C. § 659 (R. 17).

Gay was convicted by a jury (R. 240) and sentenced to

six months imprisonment on the first count and two years probation on the second count, the sentences to run concurrently.

The Court of Appeals for the Eighth Circuit affirmed the conviction on count I and vacated the conviction on count II saying:

> "Holding, as we do hereinafter, that no case was made against appellant on Count II, it is apparent that there is a variance in respect to the point of origin of the unlawful transportation between the indictment, instructions and presumably the verdict on one hand and the proof of the offense on the other hand. * * *" (Op. p. 8)

The Court went on to hold, relying on 28 U.S.C. § 2111; Rule 52, F.R. Cr. P.; and *Berger v. United States*, 295 U. S. 79, that the variance was not material, rejecting Gay's contention that since he was charged with unlawful transportation from Mason City of goods obtained by fraud; he could not be deemed guilty on appeal of transportation of the identical goods from Sioux City on the basis of their having been stolen there (Op. p. 8). The court held that *Berger v. United States*, 295 U. S. 79, rather than *Stirone v. United States*, 361 U. S. 212, relied on by Gay, governed the case (Op. p. 9). The court also cited *Gregori v. United States*, (C. A. 5) 243 F. 2d 47 and *Mellor v. United States*, (C. A. 8) 160 F. 2d 757. These cases hold that variances, without more, as to time, or the origin or terminus of interstate transportation, are harmless and do not affect the substantial rights of a defendant.

REASONS FOR ALLOWANCE OF THE WRIT

Certiorari should be granted because of the important role of indictments in the administration of federal criminal justice. The court misapprehended the teachings of

Stirone v. United States, 361 U. S. 212, as adhered to and exemplified in *Russell v. United States*, 369 U. S. 749, to the effect that variances which mislead a defendant, and allow the government to prevail on a different theory on appeal from that on which the case was tried, are too serious to be treated as harmless error.

The government framed its indictment, and proceeded at trial and on appeal, on the theory that Gay obtained the meat by fraud, thus stealing it, and committed the further offense of interstate transportation of the fraudulently acquired meat. That is precisely the reason why the government alleged fraudulent acquisition at Mason City and transportation therefrom on the same date, January 19, 1965. It must be assumed that government counsel is sufficiently skilled in the drafting of indictments that had they meant to charge in Count 1 an alternate theory that a conversion took place in Sioux City, they would have so stated by alleging a date subsequent to January 19th and transportation from Sioux City rather than Mason City.

As construed by the Court of Appeals, the indictment became inconsistent for the first time. The verdicts of guilty on both counts are consistent only on the theory, which was the theory contained in the instructions of the trial court, that Gay obtained the meat by fraud and then transported it. If the jury had convicted him on the theory advanced by the Court of Appeals, he would have been acquitted on the first count because of the obvious impossibility of his stealing meat in Sioux City that he had already stolen in Mason City. The jury, erroneously as held by the court, convicted Gay of obtaining the meat by fraud and, once it had done so, consistently, and it necessarily follows, convicted him of transporting the fraudulently acquired meat in interstate commerce.

There is certainly more than an immaterial variance when a case is tried on the theory that property was initially fraudulently acquired and a conviction is sustained on the theory that—although there was no fraudulent acquisition—there was a later theft. It is difficult to imagine a situation where defense counsel could be misled to any greater degree. Surely the defense is entitled to assume that the government means what it says and that when an indictment says that property was obtained by fraud in Mason City and that, accordingly, its subsequent transportation from Mason City was unlawful; the defendant will not have to meet a contention that the property was stolen in a different city by the same defendant who is alleged to have earlier fraudulently acquired it. If counsel felt that the government could not prove fraudulent acquisition of the property, counsel might well adopt the strategy of putting on no evidence—taking the risk the jury would be adversely impressed thereby—fortified by the belief that, if he was correct, the indictment would not be amended by the court on appeal so as to justify an affirmance on a different theory. There is nothing wrong with the government's attempting to prove that property transported to interstate commerce was either fraudulently acquired or stolen from an interstate shipment. All that is required is that the government say so in an indictment so that defendant may be apprised of what he has to meet. Fundamental fairness in the administration of criminal justice and the decisions of this Court require no less.

We quite agree that in the ordinary case of unlawful transportation such as *Gregori v. United States*, 243 F. 2d 47 and *Mellor v. United States*, 160 F. 2d 757, variance as to time, or the origin or terminus of the transportation, so long as it is interstate, are harmless and do not affect the substantial rights of the defendant. But this is not so

when the variance, here Mason City vs. Sioux City, and the date January 19 vs. the 20th or 21st, reflect an entirely different theory of the case and require entirely different factual considerations in the proof. This type of variance is not harmless and has been repeatedly condemned by this Court.

Russell v. United States, 369 U. S. 749 (1962) involved refusal to answer questions before a Congressional committee. The question was whether the indictment had to specify the subject under inquiry by the committee at the time of defendant's refusal to answer. The Court discussed at length the "protections which an indictment is intended to guarantee" saying, at 369 U. S. 763, that one of these protections is whether the indictment "sufficiently apprises the defendant of what he must be prepared to meet."

The Court said that the vice of an indictment which fails to apprise the accused, with reasonable certainty, of the nature of the accusation against him is that it "requires the defendant to go to trial with the chief issue undefined" and "enables his conviction to rest on one point and the affirmance of the conviction to rest on another" giving "the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." 369 U. S. 766.

We think Gay was faced with the same problem as one of the defendants in *Russell* and we think the Court characterized the problem vividly at 369 U. S. 768:

> "* * * At every stage in the ensuing criminal proceeding Price was met with a different theory, or by no theory at all, as to what the topic had been. Far from informing Price of the nature of the accusation against him, the indictment instead left the prosecution free

to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal."

The Court went on to say at 369 U. S. 770:

"* * * To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. See Orfield, Criminal Procedure from Arrest to Appeal, 243.

"This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. Ex parte Bain, 121 U. S. 1, 7 S. St. 781, 30 L. Ed. 849; United States v. Norris, 281 U.S. 619, 50 S. Ct. 424, 74 L. Ed. 1076; Stirone v. United States, 361 U. S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252. 'If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed. * * * Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer

> to the indictment as thus changed, the restriction which the constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists.' Ex parte Bain, supra, 121 U. S. at 10, 13, 7 S. Ct. at 786. We reaffirmed this rule only recently, pointing out that 'The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.' Stirone v. United States, supra, 361 U. S. at 218, 80 S. Ct. at 273."

The Court, at 369 U. S. 763 quoted *Smith v. United States*, 360 U. S. 1, 9, for the proposition that "the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules."

CONCLUSION

For the foreging reasons we respectfully submit that this petition for a writ of certiorari should be granted.

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JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 18911 September Term, 1968

Jesse Gay, Appellant, vs. United States of America, Appellee.	))))	Appeal from the United States District Court for the Northern District of Iowa.

This Cause came on to be heard on the record from the United States District Court for the Northern District of Iowa and was argued by counsel.

On Consideration Whereof, the judgment and sentence of the said District Court on Count I be, and it is hereby, affirmed.

It is further ordered that the judgment of conviction and order of probation as to Count II of the indictment be, and it is hereby, reversed and vacated.

It is further ordered that the cause be, and it is hereby, remanded to the said District Court for proceedings consistent with the opinion this day filed herein.

And it is further ordered that the defendant in the said District Court, Jesse Gay, do surrender himself to the custody of the United States Marshal for the Northern District of Iowa, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

March 27, 1969

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 18,911

Jesse Gay, Appellant, v. United States of America, Appellee.	Appeal from the United States District Court for the Northern District of Iowa

[March 27, 1969.]

Before Vogel and Lay, Circuit Judges, and Becker, Chief District Judge.

Becker, Chief District Judge.

Jesse Gay appeals from a conviction by a jury in the United States District Court for the Northern District of Iowa, of two counts charging violations of Section 2314, Title 18, U.S.C., and of Section 659, Title 18, U.S.C., respectively.

The first count charged that from on or about January 19, 1965, until on or about January 27, 1965, the appellant transported from Mason City, Iowa, to Houston, Texas, and Dallas, Texas, a load of meat consisting of 40,000 pounds of spareribs of an approximate value of $9,400.00, knowing "the said meat to have been stolen."

The second count charges that on or about January 19, 1965, appellant obtained the same meat "by fraud and deception from the platform and depot of Jacob E. Decker and Sons, Mason City, Iowa," ("Decker" hereinafter) when the same was "part of an interstate shipment of freight."

The Evidence

The appellant Gay was an independent trucker (not licensed by the Interstate Commerce Commission, "ICC" hereinafter), who in January of 1965 was looking for a load to haul for hire. About the same time, meat packer Decker of Mason City, Iowa, offered 40,000 pounds of spareribs for sale. Personett, the complaintiff witness in this case, was a broker in Los Angeles. Personett learned of this offering and dealt with a wholesaler in San Francisco, who agreed to buy the meat. The wholesaler directed that the meat be delivered to Pacific Cold Storage in Los Angeles.

Personett and the wholesaler agreed that the meat was to leave Iowa January 19 and to be delivered in Los Angeles January 21 in 1965.

Sometime before January 15, 1965, appellant called Personett by long distance telephone from Minneapolis or St. Paul and asked Personett if he had a load to be hauled. Appellant and Personett then agreed that appellant would haul the meat from Decker in Mason City, Iowa, to Los Angeles, as scheduled, for $700.00 which was considerably less than the charges of a trucker licensed by the ICC.

In accordance with Personett's custom, to avoid difficulties with the ICC, it was agreed that Personett would

pay $9,400.00 for the meat and request that the invoice of sale show appellant as the purchaser. Both appellant and Personett intended that Personett be the owner of the meat, and that no moneys be loaned to appellant.

On January 18, 1965, Personett sent to the appellant a copy of a confirmation showing Decker as seller and appellant as buyer of the meat. Personett also sent to appellant a second confirmation showing appellant as seller and Personett as buyer of the meat, at a price of $700.00 in excess of the purchase price.

On January 19, 1965, appellant arrived at Decker's docks. The meat was loaded into his trailer which was then sealed shut. Appellant was then given an invoice showing him as buyer, and a bill of lading showing him as consignee of the meat, by Decker. Appellant took no part in the preparation of the documents issued to him, and did not suggest that they list him as buyer.

Thereafter, on or before January 20, 1965, appellant, with his loaded trailer needing repairs, was in Sioux City, Iowa, where he sought assistance from a broker in trucking service. Appellant asked the broker, with whom he had done business, for help in securing repairs to the landing gear or support for his trailer, and in leasing a trailer for use. On January 20, appellant left his trailer at a repair shop and leased another trailer from a truck line, for a period of two weeks. On the same day appellant's trailer was repaired and returned to appellant who was accompanied by an unidentified companion. The leased trailer was returned to the lessor in Sioux City twelve days later.

While in Sioux City appellant, representing himself to be the owner, sold 8 to 10 boxes of spareribs to Michael

Econ, and 86 boxes of spareribs to Paul Braunger for $425.70, a price much below the market.

On January 28 and February 5, 1965, appellant was in Houston, Texas, where he sold two lots of spareribs to Fred Pauly. On February 1, 1965, in Dallas, Texas, he sold spareribs to Robert Perry for $4,413.20. The meat (all spareribs) was never delivered to Pacific Cold Storage in Los Angeles. Personett suffered a loss of $9,400.00 as a result.

After conviction, appellant was sentenced to six months' imprisonment on Count I and two years' probation on Count II. It was provided that the sentences would run concurrently.

I

Appellant's first assignment of error is that the trial court erred in not sustaining his motion for judgment of acquittal on both counts "for the reason that there was no substantial evidence to support a conviction under either count." More specifically, it is appellant's contention that there was no evidence which could support a finding, necessary to the verdict, that appellant was not in fact the owner of the goods which he was charged with stealing. Appellant notes in this regard that the bill of lading, the *invoice*, and the *confirmations* of Personett to appellant showed appellant as owner of the meat; that, furthermore, there existed an account (on Personett's draft for the purchase price) showing that appellant owed the complaining witness the purchase price of the allegedly-stolen meats; and that, over against this evidence, there was only the testimony of the complaining witness Personett that he "assumed" that he retained ownership, even though he admitted the listing of appellant as buyer

and owner in the invoice, the confirmations, and notations on the draft.

Appellant's contention is without merit. Assuming, without so holding, that the documents issued by Personett and Decker vested appellant with legal title to the meat, such title would not require acquittal as a matter of law on either count. *Title to goods transported is not a defense, if the title and possession were secured as a result of fraud or the goods stolen within the meaning of Section 2314. United States v. Leggett* (C.A. 6) 292 F. 2d 423; cf. *United States v. Turley*, 352 U. S. 407, 77 S. Ct. 397, 1 L. Ed 2d 430, and cases cited in note 17 thereof, including *Ackerson v. United States* (C.A. 8) 185 F. 2d 485. Therefore, the existence of title in the appellant is no defense to Count I.

Furthermore, the evidence strongly supports a finding that the meat was stolen, as defined in Instruction No. 12, following the doctrine of the *Turly* case, *supra*. See the discussion in Part III of this opinion. Finally, the documents issued by Personett before the delivery of the meat, and accepted by appellant, purported to invest appellant with title, and then to divest him of title by the contemporaneous confirmation of resale to Personett. There was substantial evidence that Personett was the beneficial owner of the meat and that the documents were part of a subterfuge to avoid or evade ICC laws and regulations and to conceal the true ownership of the cargo.

United States v. Hamrick (C.A. 4) 293 F. 2d 468, relied on by appellant, obviously does not support his first assignment of error in respect to Count I. In that case there was a total absence of proof that the defendant knew the property was solen.

II

Appellant's second assignment of error is based on the trial court's refusal to give defendant's requested instruction that the law forbids a broker using a false bill of lading or bill of sale in permitting any person to obtani transportation of property subject to ICC regulations for less than the applicable rate, and that the law prohibits the use of false documents in an effort to evade or defeat regulation prescribed by law for motor carriers or brokers. This was error, appellant contends, because the refused instruction pertained to a defense of appellant. Appellant argues that the instruction supports the defense that appellant was the lawful owner of the meat: that being the owner thereof he cannot be found to have stolen the meat. Appellant relies on *Strauss v. United States* (C.A. 5) 376 F. 2d 416, which reiterates the general rule that

> "where the defendant's proposed charge presents, when properly framed, a valid defense, and where there has been some evidence relevant to that defense adduced at trial, [the] charge must be given on that defense."

The refusal of this instruction was not error. As shown in Part I above, the existence of title in the appellant was not a defense in this case. The requested instruction was an abstract declaration of irrelevant law, which was not material to a valid defense and submitted no factual theory of a defense. It was not error to refuse such an instruction. *Ryan v. United States* (C.A. 9) 314 F. 2d 306.

III

In his third assignment of error appellant argues that the Court erred in denying his motion for judgment of acquittal on Count I "as there was no evidence to show that defendant knew the goods were stolen prior to the

commencement of the interstate transportation." This assignment is without merit. Section 2314 is violated if goods are stolen in course of transportation and thereafter transported in interstate commerce, even if the goods were not stolen before commencement of the journey. *Lyda v. United States* (C.A. 5) 279 F. 2d 461. In the *Lyda* case the defendant independent trucker received a load of pecans at Natchitoches, Louisiana, for transportation to Waycross, Georgia. He apparently started to Georgia. At Alexandria, Louisiana, he decided to "expropriate" the pecans and take them to Texas and sell them, all of which he proceeded to do. The principles of the *Lyda* case are directly in point and demonstrate the unsoundness of appellant's contentions. Here, as in the *Lyda* case, the appellant decided, at Sioux City, Iowa, to steal and sell the meat. Thereafter he transported to Texas the portion of the stolen meat not sold by him in Iowa. Appellant relies on *Loman v. United States* (C.A. 8) 243 F. 2d 327, *Wolk v. United States* (C.A. 8) 94 F. 2d 310 and *United States v. Berger* (C.A. 2) 338 F. 2d 485. None of these cases supports appellant's third assignment of error. Of the three cases cited, only the *Loman* case is remotely in point, and it is readily distinguishable on the facts. In the *Loman* case the act of stealing did not occur until the interstate journey had ended. The *Lyda* case is consistent with the *Loman* case and other cases relied on by appellant. This is illustrated by the following succinct and appropriate quotation from the *Lyda* opinion:

> "In determining this question, we may for our purposes assume what the jury perhaps did not—that the intention to appropriate the pecans did not come into being until the truck got to Alexandria—that is, that when initially received, it was the purpose to carry and deliver the goods to Georgia. For it is our view that if this subsequent action is regarded as embezzlement by one having lawful custody, this never-

theless made the goods 'stolen' at and before the interstate transportation to Texas commenced."

In his fourth assignment of error appellant contends that the trial court erred in giving appellee's requested instructions 8 and 12A, which failed to require that the government prove that "defendant knew the meat was stolen prior to the commencement of the interstate transportation at Mason City". For the reasons, stated in Part III hereof, we hold that the requested instructions 8 and 12A were not based upon an erroneous legal theory. Therefore the giving of these instructions was not error.

Further, in connection with his fourth assignment of error, appellant argues that Count I of the indictment charges the Court submitted an offense of unlawful interstate transportation of stolen goods from Mason City, Iowa, not from Sioux City, Iowa, to Texas; that therefore appellant cannot be deemed guilty on appeal of unlawful interstate transportation of stolen goods from Sioux City, Iowa, to Texas, citing *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 252.

Holding, as we do hereinafter, that no case was made against appellant on Count II, it is apparent that there is a variance in respect to the point of origin of the unlawful transportation between the indictment, instructions and presumably the verdict on one hand and the proof of the offense on the other hand. Every variance and every error in a criminal case, however, does not require reversal. Only if the variance or error is material, that is, affects the substantial rights of the appellant, is a reversal required. Section 2111, Title 28, U.S.C.; Rule 52, F. R. Cr. P.; *Berger v. United States*, 295 U. S. 79, 55 S. Ct. 629, 79 L. Ed. 1314 (holding a variance not material). We hold that the variance in this case is not material. The de-

fendant was fairly notified of the substance of the offense of which he was convicted. The relation between the charge in Count I and the offense of which proof was produced is so clear that appellant had adequate notice of the charge and is protected against another prosecution for the same offense. The effect of the instructions was to require the government to assume a greater burden of proof than the law required.

Under these circumstances the variance and error are harmless and do not affect the substantial rights of the defendant. *Berger v. United States, supra,* rather than *Stirone* v. *United States, supra,* governs this case... A similar variance was held harmless in *Gregori v. United States* (C.A. 5) 243 F. 2d 47. In the *Gregori* case the indictment charged unlawful transportation of a woman in interstate commerce from Fort Worth, Texas, to Jacksonville, Florida. The proof showed that the defendant had transported the woman from Farmington, New Mexico, to Jacksonville, with a stop in Dallas, Texas. In holding the variance harmless in a collateral attack, the Court said:

> "The indictment is thus sufficient to have withstood any direct attack that might have been made at trial or appeal."

A similar ruling was made by this Court in *Mellor* v. *United States* (C.A. 8) 160 F. 2d 757, in which there was a variance in the charge and proof of the terminus of an unlawful interstate transportation.

For the reasons stated above, the fourth assignment of error is without merit.

V

The last assignment of error is that the Court erred in

denying appellant's motion for judgment of acquittal on Count II. Appellant contends that there was no substantial evidence to support the verdict of guilty on Count II. We find merit in this contention and reverse the judgment of conviction on Count II, and the order placing the appellant on probation on that count.

The appellant offered no testimony at the trial. Therefore, the sufficiency of the evidence to support the conviction on Count II must be determined from the evidence offered by the government.

In Count II the appellant was charged with unlawfully obtaining by fraud and deception, from the platform and depot of Decker, in Mason City, Iowa, a load of meat of an approximate value of $9,400 which was a part of an interstate shipment of freight. The instruction, authorizing a verdict of guilty on this count, required the prosecution to prove beyond a reasonable doubt, among other things, that defendant obtained the meat on January 19 from the platform and depot by fraud and deception, with intent to convert the meat to his own use. The proof is clear and substantial on all essential elements required to be found by the instruction on Count II, with the possible exception of the existence of fraudulent intent at the time the meat was received. The question then is whether there is any substantial evidence to support a finding of fraudulent intention to convert when the meat was obtained from Decker. In determining this question, the following rules must be applied. The evidence and permissible inferences therefrom must be reviewed in the light most favorable to the government. *Latham v. United States* (C.A. 8) . . . F. 2d . . . (No. 19,140, February 13, 1969) and cases therein cited; *Cave v. United States* (C.A. 8) 390 F. 2d 58, l.c. 69, *cert den.* 392 U. S. 906, 88 S. Ct. 1076, 20 L. Ed 2d

1365; *Koolish* v. *United States* (C.A. 8) 340 F. 2d 513, *cert. den.* 381 U. S. 951, 85 S. Ct. 1805, 14 L. Ed. 2d 724; *Anderson* v. *United States*, 335 U. S. 280, 63 S. Ct. 599, 87 L. Ed. 829. And proof by indirect or circumstantial evidence must be considered, for intent is provable by indirect or circumstantial evidence. *Black v. United States* (C.A. 8) 309 F. 2d 331, *cert. den.* 372 U. S. 934, 83 S. Ct. 880, 9 L. Ed. 2d 765. The evidence, furthermore, can include extrajudicial admissions subsequent to the time of commission of the alleged offense. *Opper v. United States*, 348 U. S. 84, 75 S. Ct. 158, 99 L. Ed. 101; *Smith v. United States*, 348 U. S. 147, 75 S. Ct. 194, 99 L. Ed. 192; *Sansone v. United States* (C.A. 8) 334 F. 2d 287; *Tingle v. United States* (C.A. 8) 38 F. 2d 573.

However, if the proof of the essential element of intent to defraud or deceive depends entirely on an extrajudicial admission of the defendant made after the transaction alleged to be criminal, there must be independent evidence corroborating the essential admission. The reason for this rule is that the government will not be permitted to prove an essential element of the crime (or of the *corpus delicti*) solely by an extrajudicial admission of the defendant made after the commission of the alleged crime, unless the admission is corroborated by substantial independent evidence. *Opper v. United States, supra; Smith* v. *United States, supra; Sansone v. United States, supra; Tingle* v. *United States, supra.* (Corporation by independent evidence is not required if the essential extrajudicial admission occurred before the criminal act. *Warszower* v. *United States*, 312 U. S. 342, 61 S. Ct. 603, 85 L. Ed. 876.)

Viewing the evidence and the permissible inferences therefrom in the light most favorable to the government, we do not find sufficient substantial direct, indirect or

circumstantial evidence of fraud and deception prior to appellant's arrival at Sioux City, Iowa, on January 20, 1965.

The government submits that the following evidence supports the verdict: (1) "appellant called Personett and wanted to know if they had a load of meat for him for the Coast"; (2) "appellant actively recruited the trucking job and in every sense said he would bring the load to California when he agreed to take the job and said he would pick up the meat" (thereby making a "false representation"); (3) "Appellant changed trailers in Sioux City"; (4) "he sold some meat there"; (5) "he then disposed of the remainder of the meat in Texas"; (6) "he told Mr. Pauly (in Texas) that he had purchased the meat in Iowa, since he had a load of produce to pick up in Texas and wanted to pay his expenses"; (7) appellant "at all times indicated by his conduct that he would comply with his orders as a trucker." To these items we add from the government's evidence (8) that appellant was in Sioux City on January 20 when he began negotiations to rent another trailer, and to secure repairs to his original trailer in which the meat was received at Decker's; (9) on January 20 appellant left the orginal trailer at a repair shop for repairs on its landing gear; (10) on the same day the original trailer was repaired and returned to appellant who was with an unidentified companion; (11) that on January 20, or 21, appellant rented for two weeks a trailer which was too small to carry the 40,000 pounds of cargo over the highways, and not in condition to make the trip to California from Sioux City; (12) that appellant converted and sold a substantial portion of the cargo in Sioux City, Iowa, and later in Dallas and Houston, Texas; (13) that in selling a part of the stolen meat to one Perry in Dallas in February 1965, appellant told

Perry he bought the meat (in Iowa) for the purpose of speculation.

Considering each of these items of evidence alone, together, and in all possible combinations, there is no view which would justify the finding that the mat was obtained at Decker's by fraud under the uncontroverted circumstances of this case, unless the admissions in items (6) and (13) that he bought the meat to pay his expenses to Texas and for speculation are proof of the fraudulent intent.

In reaching this conclusion we agree with the government, that appellant would be guilty of fraud if he received the cargo at Decker's under a promise to deliver in California with an intention not to perform the promise. *United States* v. *Herr* (C.A. 7) 338 F. 2d 607. We fail to find, however, any basis in the evidence for finding that such a fraudulent intention existed when appellant received the meat at Decker's on January 19, 1965, except the later admission that he bought the meat to pay his expenses and for speculation. It is assumed that these admissions would justify an inference that appellant intended to convert the meat when he received it at Decker's.

Because appellant did not cause the invoices and other documents to be prepared showing him to be the purchaser, because appellant's trailer was shown by the prosecution to be in disrepair on January 20 at Sioux City, because there was no showing that it was in disrepair on January 19, because there was no evidence that the original trailer, on January 19, was too small or incapable of carrying the cargo to California, and because the movement westwards from Mason City to Sioux City was towards California, there appears no substantial evidence, other than the admissions of the existence of fraudulent

intent before appellant reached Sioux City. Except for the admissions and the events of January 20 and thereafter, every item of evidence listed above, considered alone, and in all possible combinations with inferences favorable to the prosecution, is not only presumably innocent but also wholly consistent with an intent of appellant to perform his agreement of carriage to California. Except for the admissions in items (6) and (13), no reasoning trier of the fact could find from this evidence beyond a reasonable doubt that appellant did not change his intentions to deliver when he found his original trailer in disrepair at Sioux City, delaying his journey and requiring additional cash for the expense of repair of the original trailer.

The repair and rental at Sioux City, and the dishonest transactions there, cannot be found on this evidence to have been planned by appellant on the day of receipt of the cargo unless the admissions in items (6) and (13) above are relied on.

The misconduct of appellant in Sioux City after January 19, 1965, is not reasonably contemporaneous with the alleged fraud of the previous day so as to justify an inference of intent to defraud on receipt of the cargo the previous day. It is, however, substantial evidence of stealing, an element of the offense charged in Count I, as pointed out above.

Except for the extrajudicial admissions, innocence and gulit of fraud on receipt of the cargo are equally inferable or deducible from the events in Sioux City on the following days considered separately, together or in possible combinations. In such circumstances the burden of proof of guilt of the charge in Count II has not been met. *Estep* v. *United States* (C.A. 8) 140 F. 2d 40, l.c. 45. 1 *Wharton's Criminal Evidence*, § 93, p. 187 (12th ed. 1955).

Cf. *Lyda* v. *United States, supra.* In the *Estep* case the rule is stated as follows:

> ". . . Often the line between belief and purposeful misrepresentation is fine and indistinct, between the two however lies guilt or innocence, and where the evidence is evenly balanced between guilt and innocence, a conviction cannot stand." 140 F. 2d, l.c. 45.

In other words, unless the extrajudicial admissions in items (6) and (13) may be considered, there has been a failure to prove that fraudulent intent existed at the time the alleged unlawful receipt of the cargo occurred. For ordinarily the criminal intent and the criminal act must concur in point of time. "An act done without criminal intent does not become a crime by virtue of the fact that the defendant thereafter had the necessary intent." 1 *Wharton's Criminal Law and Procedure* (1957 ed.) § 63, p. 139, 140.

This brings us to a decision of the crucial question whether items (6) and (13) are sufficient evidence from which fraudulent intent on January 19 may be inferred. If the statements that appellant bought the meat to pay his expenses to Texas and for speculation may be considered as evidence that appellant intended, at the time of receipt of the meat, to convert the meat for sale on his own personal account, the appellant is not entitled to acquittal on Count II. The portion of the statement that appellant *bought* the meat is obviously self-serving and of no assistance to the government. But this portion may be ignored and the damaging portions of the statements concerning paying expenses to Texas and speculation may be treated as admissions. *Opper* v. *United States, supra.*

The damaging admissions made long after the alleged

criminal act, however, are not corroborated by any substantial independent evidence. There is no other proof of the existence of the essential element of fraudulent intent at the time of the receipt of the meat on January 19. Except for the subsequent uncorroborated admissions, there is no proof that appellant committed the crime charged on Count II. Under the rule of the *Opper, Smith* and *Sansone* cases, cited above, an uncorroborated admission, made after the transaction, cannot be considered as proof of the essential element of fraudulent intent at the time of receipt of the meat, necessary to establish the *corpus delicti.* Therefore, the judgment of conviction and order of probation on Count II should be reversed. *Tingle* v. *United States, supra.*

This case is unlike cases in which unexplained possession of a recently stolen automobile will support an inference of knowledge that the automobile was stolen. Cf. *Ballenbach* v. *United States,* 326 U. S. 607, 66 S. Ct. 402, 90 L. Ed. 350. Here the lawful possession by appellant was explained, and the property was not shown to be stolen prior to the conversion at Sioux City. Nor was appellant shown to be practicing a scheme to defraud, by inferences from prior similar misconduct. Cf. II *Wigmore on Evidence* § 315, page 217; *Von Feldt* v. *United States* (C.A. 8) . . . F. 2d . . . (Nos. 19161 and 19162, February 11, 1969).

This case is distinguishable from cases like *Sansone* v. *United States, supra,* in which there was substantial independent evidence corroborating the admission.

Under the circumstances it is unnecessary to determine whether, when the meat was received it was part of an interstate shipment, or whether at any time appellant was

guilty of the possession of goods known to be stolen from an interstate shipment in violation of Section 659, Title 18, U.S.C. Cf. *Latham* v. *United States, supra.* This latter offense was not charged in the indictment.

Conclusion

For the reasons stated above, the judgment of conviction and sentence on Count I is affirmed, and the judgment of conviction and order of probation on Count II is reversed and vacated. This cause is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

JESSE GAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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UNITED STATES OF AMERICA

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by a jury in the United States District Court for the Northern District of Iowa on two counts. The first charged that he transported 40,000 pounds of meat in interstate commerce, from Mason City, Iowa to Houston and Dallas, Texas, knowing that the meat was stolen (18 U.S.C. 2314); the second, that he had obtained this meat, which was part of an interstate shipment, by fraud and deception (18 U.S.C. 659) (R. 240). Petitioner was sen-

tenced to six months imprisonment on the first count and to two years probation on the second, the sentences to run concurrently (Pet. App. 14). The court of appeals affirmed the first count but reversed the second, holding that the evidence was insufficient to support the verdict that petitioner had obtained the meat in Mason City with an intent to defraud (Pet. App. 19-27).

The undisputed evidence showed that petitioner, a trucker not licensed by the I.C.C., entered into an agreement with a Los Angeles meat broker to deliver 40,000 pounds of meat from a meatpacker in Mason City, Iowa, to a Los Angeles destination (R. 47-48, 50). The Los Angeles broker supplied petitioner with documentation representing that petitioner purchased the meat from the Mason City dealer and resold it to the broker at a slightly higher price. The difference represented what was in fact the transportation charge. These arrangements were made to circumvent I.C.C. regulations, and it was never intended that petitioner be the actual owner of the meat (R. 53-54). On or about January 19, 1965, petitioner picked up the meat from the dealer in Mason City, as planned (R. 122-123), but no delivery was ever made to Los Angeles (R. 102). Instead, petitioner went to Sioux City, Iowa, and sold a substantial portion of the meat there to two buyers (R. 138, 143). From Sioux City, he drove to Texas, where he sold the remainder of the meat in Dallas and Houston (R. 152, 155). Petitioner advised one of the Texas purchasers that he had purchased the meat in Iowa for speculation.

The court of appeals held the evidence insufficient to permit the conclusion beyond a reasonable doubt that petitioner had fixed on his scheme when he obtained the meat in Mason City, rather than later (at Sioux City).[1] It found, however, no reason to reverse petitioner's conviction on count 1. Although petitioner might not be charged with having stolen the meat when he began his trip from Mason City, his sales in Sioux City show that it was stolen meat at that point, before he began his interstate trip. In such circumstances, any variance between the indictment and the evidence was immaterial.

The elements of the crime charged in the first count were interstate transportation of stolen goods, and knowledge by the accused that the goods were stolen. *Loman* v. *United States*, 243 F.2d 327 (C.A. 8); *Johnson* v. *United States*, 207 F.2d 314 (C.A. 5), certiorari denied, 347 U.S. 938. The count did not focus on the acquisition of the meat at Mason City,[2] nor

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[1] The United States did not seek certiorari to review this decision, but is not to be understood as thereby conceding that it was correct. See Rule 19 of the Rules of this Court.

[2] Count one charged:

> On or about the 19th day of January, 1965, and continuing until on or about the 27th day of January, 1965, in violation of Section 2314, Title 18, United States Code, JESSE GAY did transport from Mason City, Cerro Gordo County, in the Central Division of the Northern District of Iowa, to the cities of Houston and Dallas in the State of Texas, stolen goods, wares, and merchandise, that is, a load of meat consisting of 40,000 pounds of spare ribs having an approximate value of $9,400,000, and Jesse Gay then knew the said meat to have been stolen.

did the government's case depend on proof of fraudulent acquisition to establish the illegal transportation. On the contrary, the government's evidence established the knowing and illegal character of the transportation by wholly independent evidence. It showed that after he left Mason City, but before he began his interstate journey, petitioner sold a substantial portion of it in Sioux City (Pet. App. 17). Petitioner was not the owner of the meat and was not authorized to make this sale. Thus, whatever had occurred in Mason City, he had formed the requisite intent and stolen the meat prior to taking it in interstate commerce from Iowa to Texas.

In this factual setting, the manner in which petitioner acquired the meat was relevant only with respect to the second count of the indictment, and was properly considered by the jury only with regard to that count, in accordance with the court's instruction to consider each count of the indictment separately (R. 236). Similarly, in this setting, whatever the variance between the charge contained in count one and the theory relied upon by the court of appeals to sustain petitioner's conviction under that count, it had to do with an immaterial matter—*i.e.* the point of origin of what the government plainly established was a knowingly unlawful interstate transportation. This type of variance has uniformly been deemed to amount to harmless error. *Lyda* v. *United States*, 279 F.2d 461 (C.A. 5); *Gregori* v. *United States*, 243 F.2d 47 (C.A. 5); *Mellor* v. *United States*, 160 F.2d 757, 765 (C.A. 8), see also *Berger* v. *United States*, 295 U.S. 78. No question of fair notice, as was cen-

tral to this Court's decisions in *Stirone* v. *United States*, 361 U.S. 212 and *Russell* v. *United States*, 369 U.S. 749, is presented.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1969.

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